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Roger Aceto	HARTER, SECREST & EMERY LLP	585-231-1193	585-232-2151
OUR FILE: 1641/88164.000002			

TOTAL NUMBER OF PAGES SENT (INCLUDING THIS COVER SHEET): 61 pages

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Please find attached:

Transmittal Form (1 page);  
Petitions (5 pages);  
Original Appeal Brief and 2 copies (18 pages each);  
Facsimile Cover Sheet (1 page); and  
Certificate of Facsimile (1 page).

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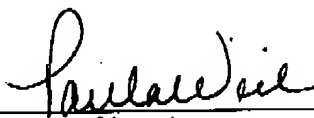
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Transmittal Form (1 page);  
Petitions under 37 C.F.R. § 1.181 and 37 C.F.R. § 1.144 (5 pages);  
Original Appeal Brief Pursuant to 37 C.F.R. § 1.192 and 2 copies  
(18 pages each);  
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Attorney docket no.: 88164.000002

Confirmation No.: 4571

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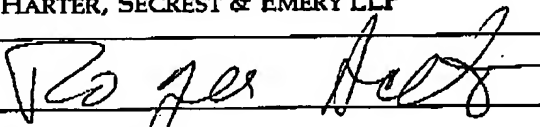
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<b>TRANSMITTAL FORM</b> (to be used for all correspondence after initial filing)	Application Number	10/062,957
	Confirmation No.:	4571
	Filing Date	January 31, 2002
	First Named Inventor	Guo, Fangjiang
	Art Unit	3643
	Examiner Name	Griles, Bethany L.
Total Number of Pages in This Submission	Attorney Docket Number	88164.000002

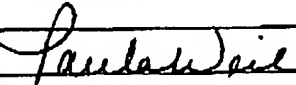
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Remarks <p style="text-align: center;">NO FEE IS REQUIRED FOR FILING THIS BRIEF AS THE CLAIMS ON APPEAL ARE THE SAME AS THOSE OF THE PRIOR APPEAL BRIEF FILED ON MAY 3, 2004</p>		

**SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT**

Firm or Individual name	Roger Aceto, Registration No. 24,554 HARTER, SECRET & EMERY LLP		
Signature			
Date	August 2, 2005		

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PATENTS

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Confirmation No: 4571

Applicant: Guo, Fangjiang

Atty. Docket: 88164.000002

Application No.: 10/062,957

Examiner: Griles, Bethany L.

Filed: January 31, 2002

Art Unit: 3643

Title: SYSTEM FOR THE PRESENTATION OF ANIMALS TO BE MILKED AND  
METHODPETITIONS UNDER 37 C.F.R. 1.181 AND 37 C.F.R. 1.144

Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

Sir:

A five-way restriction requirement was made in the subject application upon the reopening of prosecution after the filing of Applicant's Appeal Brief. Applicant files this Petition requesting the Commissioner to invoke his supervisory authority to direct the Examiner to withdraw a restriction requirement as being untimely, arbitrary and patently unfair so that all claims may remain in the subject application.

Facts

1. First Office Action rejecting Applicant's Claims 1-51 issued June 3, 2003. The Action contained 10 separate rejections relying on one or more of four references. The Action included rejections under both sections 102 and 103.

2. Applicant's response to the Office Action was filed December 3, 2003.

3. A second and Final Action issued December 24, 2003 with all claims (except Claim 35 which was cancelled) being finally rejected for the same reasons and based on the same art as in the First Office Action. While Applicant had amended certain claims, the examiner indicated that the amendatory language was in part an inherent feature of the structure. Accordingly, and in Applicant's view for purposes of this Petition, the claims remaining in the case are essentially unamended from those originally filed.

4. A Notice of Appeal was filed on March 22, 2004 and Applicant's Appeal Brief was filed May 3, 2004.

5. On August 25, 2004 and In response to Applicant's Appeal Brief, prosecution of the application on the merits was reopened and the Examiner issued a requirement that the application be restricted to one of five groups of claims.

6. On September 24, 2004, Applicant made an election to prosecute the inventions of Group IV (Claims 32-41) and requested a reconsideration of the restriction requirement including reasons as to why the restriction was improper. At the same time, and to advance the prosecution of the Application, Applicant filed a Notice of Appeal with respect to the elected claims and to all other twice rejected claims pending reconsideration of the restriction requirement. The Appeal Brief was refiled including argument with respect to all twice rejected claims.

7. On July 15, 2005, some 10 months after Applicant made the election, the restriction was made final and the non elected claims 1-31 and 42-51 were withdrawn from further consideration. Also, Applicant's Brief was deemed

defective as it now included arguments not solely directed to the claims under prosecution.

Argument

This Petition is being filed in response to the Examiner's Action of July 17, 2005 making the restriction final.

Applicant does not agree that there is adequate basis for requesting the election. However, even if such a basis existed, Applicant urges that there is no pressing need for maintaining the restriction requirement. Essentially the same claims were before the Examiner throughout the prosecution of the case. The Examiner conducted a search and issued an action rejecting all claims. After Applicant's response, the rejection of all claims based on the same art was made final. Accordingly, it would seem that regardless of the possible inclusion of separate inventions, an appropriate search was made and references found that in the Examiner's opinion were sufficient to reject claims under both 35 U.S.C. 102(b) and 35 U.S.C. 103(a).

Applicant does not contest the Examiner's authority to reopen prosecution after an Appeal Brief is filed. However, reopening the prosecution and alleging now, for the first time, that there is a plurality of inventions necessitating an election is, untimely, arbitrary and patently unfair.

The requirement is considered untimely for several reasons. The patent rules (37 C.F.R. 1.142) indicate that a restriction requirement "will normally be made before any action on the merits; however, it may be made at any time before final action." Here there were two actions on the merits on substantially the same claims; and the requirement made only after consideration of Applicant's Appeal Brief. Accordingly, the requirement was first made well after

the final action. The fact that prosecution was reopened may moot the admonition that the restriction be "made at any time before final action." However it does not moot the arbitrariness and unfairness of the requirement.

Applicant considers the restriction arbitrary for several reasons. For example, the Examiner now classifies two of the Groups, namely Group II and Group IV (Claims 12-21 and 32-41 respectively) in the same Class and Subclass (Class 119, Subclass 412)! The Examiner has twice rejected Claims in Groups II and IV based on references found in a search of a single Class in that the two references applied against the claims in these two groups were both from Class 119.14.02.

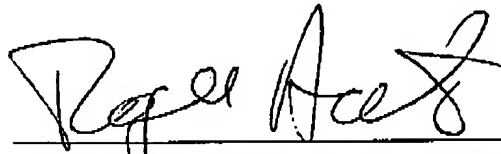
As between the claims of Group III and IV the Applicant pointed out that the alleged classification was in error because neither of the two named separate classes had anything to do with milking (the invention relating to methods for presenting an animal to be milked). The Examiner's response was that the restriction was proper because the step of milking was not recited in the claims. Applicant considers that the claims in both Groups which are directed to "A method of presenting an animal to be milked" and include reference to a milking stall and moving the animal into the milking stall do not require the step of actually milking the animal to be classified in a class pertaining to a milking method.

As between Groups IV and V, Applicant urged that use by the Examiner of the same single reference to support an anticipation rejection under 35 U.S.C. 102(b) of claims in *both* groups was ample evidence that a restriction as between the groups was not required. At the very least, given the timing of the restriction, there certainly is no pressing need to require an election.

The Examiner's action is patently unfair. Requiring an election at this late date, and after two actions on the merits, a Filing of a Notice of Appeal and the preparation and filing of an Appeal Brief, in effect voids the prosecution to date and requires that prosecution of the claims be taken up again and continued in five separate applications.

Accordingly, Applicant requests that the Commissioner's supervisory authority be invoked to direct the Examiner to withdraw the restriction so that all claims may remain subject to prosecution in a single application.

Respectfully submitted,



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Dated: August 2, 2005